No. 22,042

United States Court of Appeals
For the Ninth Circuit

ONEY L. IRWIN, RAY LESTER LONG, SHERRILL LONG, ALAN DUANE LUTHER, MELVIN LONG, WAYNE KING and HARRY EDWARD ALLEN,

Appellants,

vs.

BB CLARK, doing business as Oilfield Vacuum Service,

Appellee.

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

In this case we feel it would be helpful to state, at the outset, the essential point of the appeal in very direct and simple terms. We will either stand or fall with it; there is no secondary position to which we claim the right to retreat.

We charge a continuing violation of the Fair Labor Standards Act for which appellants should have recovered damages. Appellants were truck drivers whose hourly wages were computed to start only when a job order came in, regardless of how many hours prior to this they had been waiting on the

employer's premises to be put to work. We will show, *solely and exclusively by the employer's own evidence*, that work was more likely to be obtained by those present on the premises than by those at home. (One foreman candidly testified to instructing new employees that "the early bird catches the worm.")

The trial Court, in denying a motion for new trial, expressly conceded that presence on the premises was "one of the factors" which led to obtaining work. Nonetheless it held that the presence of the men on the premises was "voluntary", presumably in that they were free to take the risk of a smaller paycheck if they wished to. For the purpose of this appeal, and for this purpose only, it is assumed arguendo that they would not actually have been fired if they had made a practice of remaining home waiting for a call to work.

And so the question is this: as a matter of law, is presence on the employer's premises "voluntary" if it is induced by the likelihood of a better paycheck

We expect to be met by the contention that "this was a finding of fact for the trial court." But a finding that apples are oranges cannot be thus defended. The question is one of law, and we say respectfully that the trial Court erred in ruling upon it. The balance of this brief will follow the format of Rule 18 to the best of our ability.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on ebruary 17, 1967, by the United States District ourt for the Eastern District of California, on Feb- ıary 17, 1967 (R. 103), denying to appellants the eater part of the damages they sought in the action ıder the Fair Labor Standards Act and necessarily nying to counsel for appellants the greater part the attorney's fee which he sought based on ap- llants' computation of damages (R. 103). To avoid nfusion, it should be explained that at the time the tion was commenced, the trial Court was the United ates District Court, Southern District of California, orthern Division, but before judgment was rendered had become the Eastern District.

The action was brought to recover unpaid wages ıd overtime compensation as well as an additional ual amount as liquidated damages and reasonable unsel fees under the provisions of the Act of June , 1938, c. 676, 52 Stat. 1069, 29 U.S.C. Sections 201- 9, known as the Fair Labor Standards Act, a law the United States regulating interstate commerce Second Amended Complaint, R. 19, and Answer to econd Amended Complaint, R. 24).

Jurisdiction was conferred on the trial Court by the ovisions of 28 U.S.C. 1337, and was invoked by the econd Amended Complaint pursuant to this section R. 19). A timely notice of appeal to this Court was ed on May 1, 1967 (R. 125), after the denial of a otion for new trial on April 25, 1967, by the trial ourt (R. 124). This Court's jurisdiction accordingly sts upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

As previously stated, this is an action brough under the Fair Labor Standards Act by certai truck drivers, appellants here, who sought to recove compensation for unpaid working time, overtim liquidated double damages, and attorney's fees an costs.

1. The Fair Labor Standards Act

In 1938 Congress invoked the powers vested in i by the commerce clause to say that there existed i industries subject to this clause "labor condition detrimental to the maintenance of the minimu standard of living necessary for health, efficiency an general well being of workers which put an undesi able burden on interstate commerce, constituted a unfair method of competition in commerce, led t labor disputes burdening and obstructing commerc and interfered with the orderly and fair marketing o goods in commerce (29 U.S.C.A. 202-a).

Speaking a little more directly than does the statu tory language of Section 202, a Circuit Court of Ap peal has said the two major purposes of the chapte are to reinforce employee bargaining power concern ing wages by prohibiting wage rates below a certai level and reinforce employee bargaining power con cerning hours of labor by exerting financial pressu upon the employer to limit hours to a certain leve *Murray v. Noblesville Milling Co.*, 131 F. 2d 47 certiorari denied, 63 Supreme Ct. 832, 318 U.S. 77 87 L. Ed. 1145.

Definitions which establish the scope, coverage and urisdiction under the Act are contained in 29 J.S.C.A. 203. Minimum wages are established in 29 J.S.C.A. 206, and the overtime provisions of the Act re contained in 29 U.S.C.A. 207. In addition to proiding for the recovery of wages not paid in violation f these sections, Congress provided that the trial Court could in the exercise of its sound discretion npose liquidated damages in double the amount of ne unpaid compensation. 29 U.S.C.A. 216-b and 29 J.S.C.A. 260. The payment by the employer of a easonable attorney's fee to counsel for the employees also provided for in 29 U.S.C.A. 216-b, as also is the ecovery of costs of the action.

In its modern day application, the Act has little elevance where employees are effectively organized n unions and negotiate their hours and wages through ollective bargaining or the exercise of counter-ecoomic pressure. The Act now serves to provide minium labor standards for employees in particular ndustries, particularly businesses, or particular geoaphic areas where no such organization exists and ne bargaining power of employees is weak.

The facts of this case

It may serve to avoid confusion to note that the ranscript of record only incorporates the Reporter's Transcript by reference (p. 2 of Index). The Reorter's Transcript itself was prepared prior to judgent and is before this Court in two volumes as a eparate document and thus has its own pagination

rather than pagination which follows the rest of the transcript.

A pre-trial order, approved as to form and content by both counsel and signed by the trial Court on December 6, 1965, provided that the trial Court had jurisdiction by virtue of the provisions of 28 U.S.C. 1337 and that the following facts were admitted and required no proof:

1. The plaintiffs were employees of the defendant during the times and at the wages showed in the accounting heretofore rendered by the defendant in the course of discovery proceedings.
2. At the times pertinent to the complaint defendant operated a business which engaged in the work of oilfield servicing; at the same said time plaintiffs were truck drivers employed by the defendant.
3. That plaintiffs were paid for all hours actually worked at either the hourly wage rate or the overtime rate but were not paid for waiting time at the defendant's premises. (R 16-17)

The pre-trial order went on to quote the following issues of fact and no others remained to be litigated upon the trial:

A. Was the work performed by the plaintiffs directly essential to the production of oil which moved in interstate commerce or was said work a process closely related to said production of oil, so as to bring plaintiffs within the purview of the Fair Labor Standards Act

B. Are plaintiffs entitled to compensation for waiting time upon defendant's premises under the Fair Labor Standards Act?

C. Is waiting time to be considered hours worked for purposes of computing minimum wages and overtime, as required by the Act?

D. Are plaintiffs barred from recovering for the waiting time spent at defendant's yard because such presence was a part of the oral or written contracts of employment between plaintiffs and defendant or because such waiting time is a part of the custom and practice in the industry?

E. What is the amount of minimum wages and overtime due to each plaintiff, if any?

F. Are plaintiffs entitled to double recovery as provided in 29 U.S.C.A. 216b?

G. What, if any, should be the reasonable attorney's fee to be paid by the defendant, and what, if any, are the costs which should be paid by the defendant, as provided in 29 U.S.C.A. 216b? (R. 17-18)

There was no controversy as to the accuracy of the ecords kept by appellee of the hours actually logged y appellants during the two year statutory period rior to the filing of the complaint. Plaintiff's Exibit 4. Conversely, it is not disputed that the emloyer kept no record of unpaid waiting time. The oregoing statements are made in connection with the rovisions of the pre-trial order respecting an acounting rendered by the appellee in the course of iscovery proceedings to the appellants (R. 16, line 1 to R. 17, line 1).

It should further be noted in connection with th pre-trial order that the reservation of the question o whether appellee was engaged in commerce so as t bring plaintiffs within the purview of the Fair Labo Standards Act was resolved by an oral stipulatio that Mr. Clark was engaged in commercial activit bringing plaintiffs within the purview of the Fa Labor Standards Act (R.T. 188, lines 8-10).

Reserving for a moment the key question o whether the waiting time involved in this case wa compensable, it should next be pointed out that th total amount of waiting time spent by appellants du ing the two year statutory period prior to the filin of the complaint was very much in dispute. Appe lants presented the testimony of an accountant base upon the testimony of the appellant drivers as to th average amount of waiting time spent per week. Ap pellants presented oral testimony under the rule i *Anderson v. Mt. Clements Pottery Co.*, 328 U.S. 68 90 L. Ed. 1515, holding that where the employer ha failed to keep any records, as he did here of th unpaid waiting time,

> "an employee has carried out his burden if h proves that he has in fact performed work fo which he was improperly compensated and if h produces sufficient evidence to show the amoun and extent of that work as a matter of just an reasonable inference, the burden shifts to the em ployer to come forward with the evidence of th precise amount of work performed."

The evidence was summarized for the trial Court i our opening trial Court brief (R. 45 et seq. and spe

ifially R. 51). Contrary evidence was presented by hcappellee assertedly showing that the computations rcented by appellants' accountant were too high.

The reason we do not think it necessary to go into ıcrelative merits of the opposing views in this re-pct is that since the trial Court made a finding ıa the waiting time was not compensable *at all* wth a small exception which will be noted in a ıcnent), it followed that the trial Court made no ning whatever with respect to the amount of it. cordingly, if we obtain the reversal we seek here, ıctrial Court, upon remand, will have before it the ustion of the amount of unpaid waiting time, the r·priety of imposing liquidated damages in double ıdamount, as well as the question of the appropri-tc attorney's fee and costs of suit which should be wrded in view of the larger judgment. The findings f he trial Court which fail to include any finding as) the amount of unpaid waiting time are at R. 6.01.

ow as to the evidence concerning the pivotal ques-c raised by this appeal: as stated earlier, the facts i be framed for purposes of this appeal solely ıin the framework of appellee's own evidence.[1]

---

[1]However, this Court may feel moved to take into account the smony of Arminta McClain, particularly at R.T. p. 4, line 24 ıugh p. 8, line 7, in view of the fact that the trial Court re-on some of her evidence, and apparently thus found her cible, in denying our motion for new trial. (R. 124)
oreover, it is with a hard gulp that we relinquish the right ely on the testimony of Teamster official Joe Foster, who sfied regarding appellee's statement to him as follows:

The company instructions to the appellant truc drivers which gave rise to unpaid waiting time wer accurately stated by the employer's own foremer Even after the wages and hours investigation wa completed, thus plainly calling to appellee's attentio the impropriety of his conduct with respect to wai ing time, it was the testimony of Milton F. Grime his foreman, that appellee instructed his employec as follows:

> "Q. Was there a meeting that took place a about the time Mr. Sturgis completed his invest gation out there in which you attended and Mr Clark attended and the men attended?
>
> A. I believe so.
>
> Q. And Mr. Clark, one might say, officiated a that meeting?
>
> A. As I recall, he was there; yes.
>
> Q. What did he tell them then?
>
> A. In what way, sir?
>
> Q. What did he tell the men particularly wit respect to showing up at 7:00 o'clock and whe they could leave and so forth.
>
> A. Well, he told them they didn't have t show up.

"A. Do you want the exact words or the crux of h statement?

Q. Go ahead.

A. He said, 'We have to service our customers on shor notice because if we don't do it this way we won't get th business, because if we have to wait for them fellows t come from their home to get out here and pick the truck up we won't get the job; somebody else would be doing it—an they're going to be down here available for work.' That exactly what he said." (R.T. p. 174, lines 5-14)

It is to be noted that we did not adduce this testimony o direct examination, but rather it was adduced by appellee's cour sel himself on cross-examination.

Q. Ever?

A. I believe his words were, 'You don't have to show up unless you want to.'

Q. 'But if you don't show up,' what?

A. *If you don't show up, the boys that were there would get the job.*" (R. 32, line 24 to R. 33, line 7)

The foreman who preceded Grimes and whose nure filled out the two year statutory period with nich the case is concerned was named Ben D. Kretnger. He testified as follows:

"Q. Did you have any conversation about when the work came in or anything of that nature?

A. Oh, yes; they'd ask me—nearly all of them would ask me what time they should show up around there and I'd say, 'Well, usually show up around 7:00 o'clock, the rest of the boys do and to make a good job out of it, it would be well to show up at 7:00 o'clock; it's up to you.' *About show-up time, 'If you want to make a living, the early bird gets the worm.'*" (R. 32)

Even appellee himself, although he hedged a bit, sentially confirmed what his own foremen had testid to. At R.T. 137, lines 2-13, he testified as follows:

"Q. Do you know why they were there?

A. Waiting to be hired is all that I could say that they would be waiting for.

Q. Would they be more apt to get the job if they were there than if they had to be called at home?

A. If it were a rush job or—yes.

Q. In other words, is it a fair statement
say that you are testifying that the men who d
show up at 7:00 o'clock prior to this date of t
departure of the dispatcher for back east we
doing it on their own initiative because th
thought they might have a chance to get a ru
job?

A. Yes." (R.T. 136, line 11 to R.T. 137, li
14)

Thus, even according to appellee and his own fo
men, the presence of appellants on the premises du
ing the uncompensated waiting periods was do
under the economic coercion of earning lesser mon
if they took their chances by staying home. The que
tion presented by this appeal is whether the tri
Court, in finding that the men were "free to co
and go as they pleased" (R. 97, line 27) was groun
for finding that the time was not compensable,
whether, on the other hand, the clear evidence th
economic coercion made the waiting time involunta
in *fact,* even if it is assumed that it was "voluntar
in form, made the unpaid waiting time compensab
under the Fair Labor Standards Act.

The trial Court rendered judgment for the sho
period of time between June 25, 1965, and July 5, 196,
on the basis that the appellants were actually r
quired to remain on the premises by explicit orde
during that period (R. 100, lines 19-22). The amoun
were nominal, although it was interesting to note th
the Court imposed the penalty which may be impos
on a discretionary basis for this tiny period by givi

ıe full measure of double damages in each case (29 .S.C.A. 216-b, 29 U.S.C.A. 260, and R. 103-104).

From this judgment we appeal.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in finding that the ıiting time spent by appellants on appellee's prem-ːs was not compensable.

2. The District Court erred in refusing to render dgment for the uncompensated waiting time, with ːe nominal exception heretofore mentioned.

3. The District Court erred in not rendering judg-ːnt substantially as proposed in the opening trial ːurt brief (R. 51) in the total sum of $51,892.16, or some other amount supported by the evidence.

ARGUMENT

We think appellee's own evidence makes it per-ːtly clear that the time spent by appellants on ap-ːllee's premises waiting for jobs to come in was "oluntary" solely in the sense that the men were ːe to stay home and starve themselves and their ːnilies to death if they wished to. And we think ːequally clear that the trial Court's finding that the ːn were "free to come and go as they pleased" is ːy true in the sense that the men were free to leave ːe premises any time they were willing to lessen the ːelihood that they would have any work that day

(cf. testimony of the foreman Grimes, the foren
Kretzinger and appellee himself, already quoted a
cited). The question is therefore starkly present.
may an employer use the economic coercion of l
work or no work on a given day to pressure the e
ployees to remain on his premises, even assum
arguendo that their presence was in that cont
"voluntary" and that in the same context the n
were "free to come and go as they pleased."

Walling v. Dunbar Transfer and Storage, Inc.
Labor Cases 64,599 at 64,600 (we can find no F
Supp. citation), is a good point of departure.
think it worthwhile to quote the Court at length
follows:

> "('Call and Demand' Service)
>
> "Defendant furnishes 'call and demand serv
> to other common carriers and the general pub
> representing itself to be prepared to han
> freight at any time on demand without pr
> arrangements.
>
> * * * * * * * *
>
> "(Employment Upon 'check-in and check-o
> Basis)
>
> "(1) Employees were not credited with
> compensated for all hours worked: From the
> fective date of the Act to the date of trial,
> fendant worked drivers and helpers upon
> 'check-in and check-out' basis. By schedules a
> bulletins prepared and posted, as well as by
> structions from defendant's officials, employ
> were required to report and did report for w
> at specified times each day. They were
> 'punched on' the time clock when reported

accordance with instructions unless they were immediately assigned to some specific task. When they were eventually assigned to some specific task they were 'punched in', but received no credit for the time between the time they reported and the time they were assigned to the specific task. When each individual task was completed, employees were 'punched out' but were required to remain on or near defendant's premises for later assignments. Defendant furnished and equipped a room for the use of employees when not engaged in performing a specific task. By instructions of defendant's officials, defendant's employees were not permitted to leave the premises until specified times each day, except upon express permission of defendant's officials . . .

"*It was for the benefit and to the advantage of defendant and necessary for the successful operation of its business that its employees remain immediately available for assignment to specified tasks.*

"If employees absented themselves without permission, upon their return they were criticized by defendant's officials, warned that such absence must not be repeated, *and in some instances, at least, they were discriminated against.*

"Employees waited for varying periods after reporting for work before receiving a specific assignment, and were checked in and out between jobs even though as little time as two or three minutes intervened between specific tasks, and under instructions of defendant's officials remained on the premises after their final specific assignment, for the day as much as an hour and

a half to two hours without receiving cre
therefor.

"(Waiting time of Truck Drivers)

"Defendant had contracts with the Ac
Freight Forwarding Company under which
picked up freight at railway terminals for
livery in Shelby County, Tennessee, and W
Memphis, Arkansas. At each of the railway t
minals defendant had a foreman. When e
ployees were required to go to the freig
terminals to pick up Acme freight, they w
instructed so to do by the warehouse forem
who at the time he gave the instructions, punch
the employees off the clock if they at the ti
were engaged in a specific task. Employees w
then required to get their trucks from the gara
check the gas and tires, drive to the railway t
minal, and wait for a loading space, a freight c
to be unloaded or a checker to be available bef
they could begin loading their trucks. They
ceived no credit or compensation for time
spent, being credited only with time spent aft
they started loading. The freight terminal fo
man at one of the terminals prepared what a
known as 'Acme time slips' upon which
entered the time each employee arrived at t
terminal, the time he started loading and t
time he left the terminal; at the other freig
terminals the foreman prepared such slips sho
ing the time the employee started to load and t
time he left the terminal. These slips were d
livered to defendant's timekeeper who enter
upon the employee's time cards as the time
started to work the time the Acme slips show
he began loading his truck.

"(Deductions for Lunch Time)

"Defendant's employees driving or helping on trucks picking up freight and making deliveries frequently were given assignments necessitating their being away from the warehouse with their trucks for several consecutive hours. If employees were absent approximately six or eight consecutive hours, as shown by their time cards, the noon hour being one of these hours, they were docked thirty minutes for lunch; if they were absent a greater number of hours, in numerous instances they were docked one hour for lunch. Defendant's officials had given employees instructions that on such assignments they were responsible for defendant's trucks and their cargos, and that they were not to stop or leave the truck for personal purposes. In some instances employees, having their lunches with them, ate while driving or waiting at a customer's place of business for an opportunity to receive or deliver freight; in other instances employees had no lunch nor took any time off for lunch. Employees on occasions complained to defendant's timekeeper about being docked for lunch time not taken by them. Occasionally, the timekeeper would advise employees that he would rectify the situation, without doing so; on other occasions he failed or refused to do anything about it. Employees were not permitted to punch their own time cards."

We think the parallels to the instant case in *Dunbar Transfer* are remarkably close. Other cases in the field of waiting time are: *Armour & Co. v. Wantock,* 323 US 126, 89 L. Ed. 118, 65 S.C. 165, and *Skidmore v. Swift & Co.,* 323 US 134, 89 L. Ed. 124, 65 S.C. 161,

and particularly the annotations immediately follo
ing in the Law Edition volume.

It is immaterial that appellants put up with a
pellee's conduct with respect to waiting time. Th
Court well said in *Travis v. Ray,* 41 F. Supp. 6 at pag
8:

> "The evidence shows that the plaintiff volu
> tarily agreed that his compensation be paid
> the form of commissions which necessarily mea
> that it would vary in amount from week to wee
> that the plaintiff computed the amount that h
> was entitled to under his contract and receiv
> payment in full from the defendant; and that n
> claim was made at the time that he was entitl
> to any additional compensation. But such a co
> tract of employment and such a method of pa
> ment does not remove the case from the provisio
> of the statute. The statute is mandatory upon th
> employer, not permissive. When the law becam
> effective, it imposed the duty upon the employ
> to pay the employee the minimum wage provide
> regardless of the method of making the paymen
> The compensation paid must total the sum
> hours worked times the minimum rate per hou
> for the period under consideration, regardless
> whether it was paid in the form of a weekly wag
> or a commission. The emphasis of the statu
> is upon the amount paid not the method by whic
> it is paid. Neither the employer nor the employ
> have the right to agree by contract that th
> amount actually paid and received shall be les
> than the minimum amount specified by the statut
> The statute imposes a minimum which must b
> complied with. *Williams v. Jacksonville Termin*

Co., supra; *Morgan v. Atlantic Coast Line R. Co.,* D. C., 32 F. Supp. 617."

his Court itself has earlier insisted on "economic ity" in applying the provisions of the act. *stover v. Stockholders Publishing Co.,* 237 F. 2d And it has been said that the Fair Labor Stand- s Act should be interpreted in the light of the derlying economic realities". *Rutherford Food p. v. McComb,* 331 US 722 at 727, 91 L. Ed. 1772, S.C. 1473; *Bumpus v. Continental Baking,* 124 F. 549 at 551.

We respectfully urge that economic reality will have n entirely ignored if this judgment stands. A man- cturer of specialty items, whose factory can be run st economically only when he receives a specific er justifying a production run, could make non- se out of the Fair Labor Standards Act. He could e on his payroll three times as many employees as actually needed and then instruct them as follows: Then we do not have a production run going, your sence here is purely voluntary; indeed, you are e to come and go as you please. However, those o are at their machines on the line at the time that roduction order arrives at the factory will, for the st part, be the people who will be employed and d for the work done during the production run." rely it is self-evident that workers would be on the e hour after hour waiting to be there when the rk came in. The manufacturer could have instant oduction and economical production, but he would

have it at the cost of insufferable hardship. Ev
more pertinently, he would have rendered a mocke
of the Fair Labor Standards Act.

Finally, the case of *Goldberg v. Harold Gable,* 5
Labor Cases 41,352 (we can find no Fed. Supp. cit-
tion), is worth quoting in full because the distinctio
between the two cases so precisely defines our poit
on this appeal:

> "Findings of Fact.
>
> 1. The Court finds that there is jurisdictio
> in the Federal Court for the issues and partis
> involved in the above entitled matters.
>
> 2. The Court finds that the defendant ws
> engaged in the business of operating an oil wl
> servicing company; that such business is carrid
> on by the operation of a well servicing unit ad
> a crew usually of four men; that the parties
> whose behalf the suits were brought were al
> former employees of various crews employed b
> the defendant.
>
> 3. The Court finds that the method of th
> operation of the defendant's business during th
> times involved was to require all employees
> report in to the office of the company at 7:0
> o'clock in the morning; that they could and us-
> ally did appear personally, but on occasions call
> in by phone to report to the company at 7:0
> o'clock. If there was then work to be done, th
> crew left and were paid by the hour for the wor
> accomplished. In the event there was no work
> 7:00 o'clock, the men were allowed to come an
> go as they pleased, subject, however, to the r

quirement that they advise the company where they could be reached, either personally or by phone. The Court further finds that the purpose of such requirement was to be able to locate the crew in the event employment was secured during the day.

That after 3:00 o'clock p.m. the requirement that they leave their telephone number or instructions as to the place they could be located was no longer required.

4. The Court finds that because of the nature of the work and by reason of the fact that the employees could not be assured of a job or call on each day, and in order to retain the services of experienced men upon a crew, the defendant guaranteed a 40 hour week to all employees. That such guarantee was applicable, however, only in the event the men reported and were available as required. The Court further finds that under the evidence the employees were not required to stay upon the employer's premises, but could come and go wherever and whenever they desire, so long as they were available as above set forth.

5. The fact issue to be determined by the Court is whether the men were "employed to wait, or waiting to be employed" during those periods between 7:00 o'clock in the morning and 3:00 o'clock p.m. in the afternoon during which time no work jobs were available to the company. The Court further finds as a matter of fact that the employees were waiting to be employed, and were not employed to wait, and that such time was not compensable time, other than covered by the 40 hour guarantee."

"Conclusions of Law.

The Court concludes as a matter of law:

1. That there is jurisdiction in the Fede
Court as to the issues and parties involved in te
above entitled matters.

2. That the time spent by the employees
tween 7:00 o'clock a.m. and 3:00 o'clock p.m. t
times when there were no work jobs available
the company were not compensable hours otl
than as such hours were legally included in te
40-hour guarantee, providing the employees we
available for work when called.

3. Judgment should be rendered for
defendant in each instance, and against the pla
tiff."

The crucial distinction, of course, is that in the ca
just quoted and cited, the economic coercion of m
likelihood of work in the event men were present
the premises was *totally absent,* whereas in the pres
case its presence is uncontroverted. Moreover, the 7
a.m. "show-up" in the cited case was fully compe
sated by the guarantee of a 40-hour week to all e
ployees. There was no such guarantee in the pres
case at all.

CONCLUSION

It has been said that the Fair Labor Standards Act a remedial piece of social legislation with a humanitarian end in view and therefore it is to be construed liberally. *Mitchell v. Loveland, McGohe & Assoc.*, 358 U.S. 207 at 211, 3 L. Ed. 2d 243, 79 S.C. 260. But we respectfully that liberal construction is not needed here. Simply normal, reasonable construction of the statute requires that this judgment be reversed and remanded with instructions to make findings consistent with the holding that appellants' waiting time should be fully compensated.

Dated, Bakersfield, California,
January 16, 1968.

Respectfully submitted,
DI GIORGIO, DAVIS, NAIRN & KLEIN,
By THOMAS R. DAVIS,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

THOMAS R. DAVIS.